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Co-Operative Federalism in India: An Analysis in Light of Recent Trends

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I. INTRODUCTION

For any federal country method of dispersing power among its' constituent units i.e. states, counties, municipality etc. is always a predicament. Federalism, or the relationship between a central authority and its smaller, constituent parts, can vary quite widely in each federal country. Throughout history, different countries have come up with different models of federalism and ways of dividing the responsibilities of government. One such method of dividing this power is through "Co-Operative Federalism", in which the national government co-operate with States or regional governments to administer and enforce national policies. In this Article, the Author wishes to discuss the concept of "Co-Operative Federalism" in Indian context, while highlighting the recent trends with special emphasis on recently passed the 101st Constitutional Amendment Act, 2016 for introduction of Goods and Service Tax ('GST').

II. CONCEPT OF FEDERALISM

The term *federalism* is derived from the Latin root *foedus*, which means "formal agreement or covenant. It refers to a system of government in which sovereignty is constitutionally shared between a central governing authority and constituent political units (such as states or provinces)¹. A *federation* in this sense involves a division of power between constituent units-sometimes called 'provinces', 'cantons', possibly 'cities', or confusingly 'states'—and a common government. This division of power is



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typically entrenched in a constitution which neither a member unit nor the common government can alter unilaterally².

Close inspection of different definitions given by Scholars reveal that there is no consensus between authors on the definition of federalism and there is an underlying fragility in each theory³. Dicey has stated that federalism is a national constitution for a body of states which desire union and do not desire unity⁴. Whereas, Wheare⁵ defines Federalism as a method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent. As per Wheare, what is necessary for the federal principle is not merely the general government should operate directly upon the people, but rather than each governments should be limited to its own sphere should be independent to the other. The view of Wheare was however criticized by Birch. Birch suggested that overlapping of Government functions is so great that to suggest that two levels of Government were in fact restricted to separate sphere was quite unrealistic⁶. As per Birch, A federal system is one in which there is a division of power between one Central and several regional authorities, each of which, in its' own sphere, is co-ordinate with the others⁷. It is also observed, albeit in the Indian context that, the essence of a federation is the existence of a Union and its' States and the division of power between the Union and the State and it is immaterial whether the bond of the union is strong or weak⁸. Riker on the other hand defines federalism in a very simple way saying that "The Constitution is federal if it

provides for two levels of Government, each of which has some guaranty of its contained autonomy within its sphere⁹.

As per Garner¹⁰, Federal Government, as contradistinguished from a unitary government, is a system by which the totality of government power is divided and distributed by the national constitution or the organic act of the parliament creating it between a Central Government and the Government of Individual States or other territorial sub-divisions of which the federation



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is composed. Federalism is also considered to be a special mode of political and social behaviour as well, involving a commitment to partnership and active co-operation on the part of individuals and institutions that at the same time take pride in preserving their own respective integrities¹¹. Federalism is typically understood in contradiction with the unitary government. As contradistinguished with the federal constitution, is a Unitary Constitution in which the Central Government is supreme. There may, and usually do, exist local government in the unitary state having certain assigned functions to discharge, but these local governments exist, at the sufferance of the centre, and their area of operation is confined to what the Centre seeks to confer on them which may be curtailed, unrestricted and modified by the Centre and at its' own will¹².

III. TYPES OF FEDERALISM

As the aforesaid analysis reveals that there is nothing static about the federal concept. Today there is no country which may be said to have 'pure' federalism in the sense of there being a complete dichotomy of functions, or a complete equality of status, between the Centre and the States¹³. Though there is division of functions between the Centre and the units in a federation, and the respective areas of competence of each is earmarked, yet it would not be correct to assume that the various governments act in water-tight compartments. As these governments act side by side in the same country, inevitably many types of relations arise amongst them and many instrumentalities to promote intergovernmental co-operation come into existence. Depending on the geo-political nature of a country, federalism prevalent may vary in a number of aspects in great detail. On the basis of these differences, various kinds of federalisms are divided in different categories:¹⁴

Dual Federalism

Dual Federalism is an idea of having separate but equally powerful branches or levels of government. In such federalism, both state and national levels have a lot of power to balance each other out. Some ways in which this balance was achieved was by what is known as the concurrent powers. However, as federalism and the nation evolved over time,



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these concurrent powers blurred and the distinction between them became less clear. In case there is a clear distinction of powers between the union and state, the Federalism is referred to as "layer cake federalism". In case there is no clear distinction of powers between the union and state, the Federalism is referred to as "layer cake federalism"¹⁵.

Competitive Federalism

Competitive federalism is an intellectual construction that locates governance within an openly competitive approach to processes of social organization. This model stands in contrast to that of dual federalism, which envisions different levels of government as possessing sole, monopolistic authority in their assigned areas¹⁶. In various countries including U.S.A., Canada and Australia, the dominant operative concept was that of 'competitive federalism' during the formative stages, which represented a spirit of competition and rivalry between the Centre and the States.

Co-operative Federalism

Co-operative federalism is a political and constitutional concept developed in the early 20th century that emphasizes the decentralization of power and a not necessarily equal sharing of governmental responsibilities between federal, state and local agencies and institutions¹⁷. This concept is discussed in detail in following paragraphs:

IV. CO-OPERATIVE FEDERALISM : A STUDY

E. Corwin¹⁸ defines Co-operative federalism as a model where national government and the states are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the current problems. Peter W. Hogg¹⁹ explains, "the related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to produce what is generally described as "cooperative federalism".



It is understood that in Co-Operative Federalism, National and State Governments tackle issues together in a cooperative fashion as opposed to a system in which policy is imposed on local administrators by an all-powerful federal regime. As a consequence, both national and state governments are simultaneously inter-dependent. Paras Diwan²⁰ in this regard has observed that "It is essentially a cooperative federation, where two sets of governments are not antagonistically independent of each other but coordinate, cooperate and collaborate in each other's efforts "to secure to all its citizens justice, social, economic and political, liberty of thought expression, belief, faith and worship; equality of status and of opportunity; and to promote fraternity assuring the dignity of the individual and the unity and integrity of the Nation".

V. FEDERALISM IN INDIA

It is significant to note that the Constitution of India does not use the term 'federal' to describe India²¹. Article 1 (1) of our Constitution though provides "India, that is Bharat, shall be a union of States". It is also pertinent to note that Dr. B.R. Ambedkar said in the Constituent Assembly that the word 'Union' instead of the word 'Federal' is used for two definite advantages, viz. Indian federation is not the result of an agreement by the units, and that the component units have no freedom to secede from it²².

Despite, this Constitution of India prescribes a structure of governance which is essentially federal in nature:

1. *Separation and Clear Demarcation of Powers:* Constitution has clearly demarcated the jurisdictions, powers and functions of the Union and the State Governments.

2. *Separate Governments*: Constitution has provided separate governments at the Union and the States with separate legislative, executive and judicial wings of governance.
 3. *Bicameral legislature*: the Indian Parliament has two Houses, with the Upper House Known as the Rajya Sabha and the Lower House being known as the Lok Sabha. Upper house constitutes with the representatives from the states.
 4. Clear provisions regarding legislative, administrative and financial relations between the Union and the States.
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Paul Appleby²³ calls the Indian Constitution as extremely-federal. The so called autonomy of the states appears to be a myth or practically impossible in certain circumstances. The biggest threat to the autonomy of the states is the provisions like Article 356. Further, unlike the classical federations like the USA, Indian federation is not an 'indestructible union of indestructible states'. Only the union is indestructible and the states are not. It may be pertinent to note that, Article 3 of the Constitution vests the Parliament with powers to constitute new states by separating territories from the existing ones, alter their boundaries, and change their names. The central government in India has the powers, and it actually does invade the legislative and executive domains of the states²⁴. Moreover, our constitutional system stands on the foundation of co-operative federalism presuming interdependence of national and regional governments of a federal union instead of granting them absolute independence in the allotted sphere pertaining to a classical federal model. In the midst of a strong Central Government, our founding fathers sought to ensure that it "would not necessarily result in weak provincial government that are large administrative agencies for central policies"²⁵.

The Constitution of India is basically federal, but, with striking unitary features. For example, there are articles of the Constitution which are clearly unitary in nature²⁶, for example:

- Article 248: with regard to residuary powers of legislation;
 - Article 249: power of Parliament to legislate with respect to a matter in the state list in national interest;
 - Article 250: If there is any national emergency, Parliament has the right to make laws with respect to State subjects automatically
 - Article 253: parliament can make laws on State Lists to comply with the international agreements
 - Article 257(2) giving directions to a state;
 - Article 271: surcharge on certain duties and taxes not to be shared with the states.
 - Article 356: In the case of president's rule in state all the powers will be handed over to Parliament
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- Article 160: Parliament can give some financial orders or can order to reserve money bills passed by states
- Article 256: Centre can give administrative directions to the States

It is thus clear that the Constitution has given overriding powers to the Central government. States must exercise their executive power in compliance with the laws made by the Central government and must not impede on the executive power of the Union within the States. Importantly, the Executive head of the State i.e. Governors is also appointed by the Central government. The Centre can even take over the executive of the States on the issues of national security or breakdown of constitutional machinery of the State²⁷. In view of the above overriding powers given to the Union various authors have been reluctant to call India as a federal country and instead the Constitution is often been described as 'quasi-federation'²⁸, 'semi-federation'²⁹, 'pragmatic federation'³⁰ "bargaining federalism"³¹ or a 'federation with strong unitary features'. In fine, it may be reiterated that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type³².

Judicial View on Federalism in India

A 13 judge Constitutional Bench of Supreme Court in the landmark judgment of **Kesavananda Bharati**³³ case for the first time had propounded the theory of basic structure of constitution. In a same judgment, it was also observed in the minority opinion that federal character of the Constitution was one of the basic features of the Constitution³⁴. Further, another Constitution Bench in **S.R. Bommai**³⁵ held that Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strong unitary features. Also, in **Samsher Singh**³⁶ the Hon'ble Supreme Court noted various unitary features in the Constitution of India. Later, the Hon'ble Supreme Court in




State of Haryana v. State of Punjab³⁷ the words "semi federal" was used to describe the Indian Constitution. It would be interesting to note the observations of the Hon'ble Supreme Court:

"In a semi-federal system of Government, which has been adopted under the Indian Constitution, all the essential powers, both legislative and executive have been conferred upon the Central Government. True federalism means the distribution of powers between a Central authority and the constituent units. Dicey's concept of federalism is a national constitution for a body of States, which desire union and do not desire unity. According to him, a federal State is a political contrivance intended to reconcile national unity and power with the maintenance of State rights. The essence of a federation is, therefore, existence of a Union and its States and the division of power between the Union and the States. If the component parts of a State have no power of policy decision in any field, but are confined to carrying out the Central Government directives through the medium of an institutional fabric of federal form, it is not a federal but a unitary State. Political integrity of the Union and each State seems to be essential to the federal concept. Authors, therefore, described our Government to be one which is federal in structure but somewhat unitary in spirit".

In **State of West Bengal**³⁸ the Supreme Court observed that Indian Constitution is not true to any traditional pattern of federation. Supreme Court also observed that

there is no warrant for the assumption that the Provinces were sovereign, autonomous units which had parted with such power as they considered reasonable or proper for enabling the Central Government to function for the common good. The legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country and the distribution of these powers — save those withheld from both the Union and the States by reason of the provisions of Part III — between the Union and the States.

Hon'ble Supreme Court in **Indira Nehru Gandhi v. Raj Narain**³⁹ noted that "while introducing the Draft Constitution in the Constituent Assembly, Dr Ambedkar said that our Constitution avoided the tight mould of federalism in which the American Constitution was caught and could be "both unitary as well as federal according to the requirements of time and

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circumstances". We have what may perhaps be described by the phrase, "cooperative federalism", a concept different from the one in vogue when the federations of United States or of Australia were set up.


Further, in **State of Rajasthan**⁴⁰, Supreme Court notes the observation of Granville Austin⁴¹ wherein she is of the view that "the Constitution of India was perhaps the first constituent body to embrace from the start what A.H. Birch⁴² and others have called "cooperative federalism". In the same judgment, Chief Justice Beg called the Constitution 'amphibian', in the sense that it can move either on the federal or on the unitary plane, according to the needs of the situation and circumstances of a case."

VI. CO-OPERATIVE FEDERALISM — FEATURES IN INDIAN CONSTITUTION

The framers incorporated into the Constitution, an infrastructure to promote co-operation and coordination, and minimize tensions, among the various governments. Several features and provisions of the Constitution have been deliberately designed to institutionalize the concept of Centre-State co-operation⁴³. There are following examples of co-operative federalism existing in Constitution of India;

1. Article 252: Provisions for enabling Parliament to legislate in the State area on the request of two or more States,
2. Article 243-I: Constitution of Finance Commission and Scheme of financial relations between the Centre and the States,
3. Article 275 and Article 282: Grants in-aid under the scheme of Centre-State administrative relationship along with provision for all-India services
4. Article 307: Creation of agencies for the purposes of of articles 301, 302, 303 and 304

The above Articles are tools designed by the framers of the Constitution to promote inter-governmental co-operation and introduce the necessary flexibility in an otherwise rigid federal system. However, even outside the Constitution, a number of bodies have been established either by statutes or by executive with a view to facilitate inter-governmental co-operation. A notable example of Centre-State co-operation is furnished by the fact-situation in **Jaora Sugar** case⁴⁴ where Parliament used its own legislative

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power to validate the State tax on entry of sugarcane into the premises of sugar mills,

which had been declared invalid by the Supreme Court. As per MP Jain⁴⁵ following features in Indian Constitution indicate co-operative federalism:

A. Full Faith and Credit Clause

Article 261 of the Constitution of India provides that full faith and credit shall be given throughout the territory of India to all the public acts, records and judicial proceedings of the Union and of every State. This is a step to promote cooperation and faith between the Centre and the states. Further, 261(3), final judgments or orders delivered or passed by civil courts in any part of the territory of India can be executed anywhere in the country according to law. The full faith and credit clause promotes uniformity and unity throughout the territory of India and promotes cooperation between the states and the centre and gives due credit to all the public acts.

B. Inter-State Council

Article 263 provides that the President may by order appoint an Inter-state Council if it appears to him that public interest would be served by its establishment. The President is also empowered to define the organization, procedure and duties of the Council. In *T.N. Cauvery Neerppasana Vilaiporulgal Nala Urimai Padhugappa Sangam v. Union of India*⁴⁶, the Supreme Court has held that once the Central government finds that the dispute referred to in the request received from the State government cannot be settled by negotiations, it becomes mandatory for the central government to constitute a tribunal and to refer the dispute to it for adjudication. In 1990, in *Dabur India Ltd. v. State of U.P.*⁴⁷, the Supreme Court suggested the setting up of a council under Article 263 to discuss and sort out problems of central state taxation.

C. Centre and State Zonal Councils

States Reorganisation Act, 1956 has introduced the concept of Centre and the States, Zonal Councils. These councils have been created in order to bring the states of a particular region in close conformity with each other. The Zonal Councils were created as an instrument of intergovernmental consultation and cooperation mainly in socio economic fields and also to arrest the growth of controversies and particularistic tendencies among

the various States⁴⁸. It is important to note that the Sarkaria Commission has opined that the Zonal Councils have not been able to fulfil their aims and objections. The commission recommended that these Councils be appointed under Art. 263 so that they get the status of constitutional bodies functioning in their own right, however this recommendation has not been implemented.

D. Inter-State River Water Disputes Tribunal

India has a number of inter-State rivers and river valleys. The waters of an inter-State river pass through several states. Such waters cannot be regarded as belonging to any single riparian state. The waters are in a state of flow and, therefore, no state can claim exclusive ownership of such waters. No state can legislate for the use of such waters since no State can claim legislative power beyond its territory⁴⁹. Some of the disputes concerning such rivers date back to the 19th century and relate to a period when (British) India was governed by enactments prior even to the Government of India Act, 1919. Some relate to the period when British India was governed by the Government of India Act, 1919 or the Government of India Act, 1935. Many such disputes have been adjudicated after the commencement of the Constitution, by Tribunals constituted under article 262 of the Constitution, read with

the Inter-State Water Disputes Act, 1956⁵⁰. Article 262(1) empowers the Parliament to provide by law for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of any interstate river or river valley⁵¹. Under Article 262(2), Parliament may also provide that, notwithstanding anything in the Constitution, neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint.

E. Finance Commission, Planning Commission, National Development Council

Despite a separate power of taxation given to the States, a substantial amount of money is granted by the Centre to the States for execution of the Five Year Plan on the recommendation of the Finance Commission. The funds by the Centre is transferred in the form of grants under Article 282 and loans under Article 293.



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While the Finance Commission was created under the Constitution, the Planning Commission was established by a Resolution of the Government of India in March 1950 in pursuance of declared objectives to promote standard of living of the people by efficient exploitation of the resources of the country, increasing production and offering opportunities to all for employment in the service of the community. However, the functions and working of Planning Commission has been widely criticized. By assuming the crucial function of allocating resources to the States, the Planning Commission clearly comes into conflict with the role of Finance Commission⁵². Central Government has thus scrapped the planning commission and replaced it with NITI Ayog.

VII. NEED OF CO-OPERATIVE FEDERALISM - CO-OPERATIVE FEDERALISM

During the initial years of Indian Constitution, the present structure of federalism worked well due to dominance of one party at both center and states. However, the 1989 parliamentary elections were a watershed in bringing about greater federalization of the political system. One of the important reasons for this development was the shift from one-party dominant party system to a multiparty system and the prominent rise of regional political parties⁵³. This has led to many disputes between the Center and States including legislative competence and executive authority. Former Finance Minister, Mr. Yashwant Sinha also suggests about the strong need for federalism in the country⁵⁴. As per him currently there is an unequal balance of power between the Centre and State. He further argues that Federalism is the coming together of equal partners who come with a common goal and share powers and jurisdictions. In other words, in order to realise the federal structure and smooth functioning of the government, it is important that there is a coherence between the Centre and State Government. The need of co-operation between Centre and State is further increased due to highly globalized economy and politics in recent times.



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VIII. RECENT TRENDS TOWARDS CO-OPERATIVE FEDERALISM

Recent trends have indicate an enhanced co-operation between the Centre and the States and slow but steady shift towards co-opeartive federalism.

Sarkaria Commission Report

In response to an insistent demand to review the Centre-State relations, the Central Government in 1983 appointed a Commission under the Chairmanship of Justice Ranjit Singh Sarkaria, a retired Judge of the Supreme Court. The commission was mandated to examine and review the working of the existing arrangements between the Union and States in regard to powers, functions and responsibilities in all spheres and recommend such changes or other measures as may be appropriate keeping in view "the social and economic development that have taken place over the years and have due regard to the scheme and framework of the Constitution which the founding fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance for promoting the welfare of the people"⁵⁵. The Commission presented its' report in the year 1987-1988.

In its report while the Commission suggested some adjustment in the Centre-State relationship in several ways, although it did not make any suggestion for any fundamental change in the structure of the constitutional provisions relating to federalism⁵⁶. Sarkaria Commission emphasized on need of co-operation between Centre and State. Sarkaria Commission also recommended more empowerment of Zonal Council and other inter-state bodies. It also gave suggestions like center should consult state before legislation on concurrent list.

Government constituted another Commission on Centre-State Relations under the chairmanship of Justice Madan Mohan Punchhi, former Chief Justice of India, on 27th April 2007, to look into the new issues of Centre-State relations keeping in view the changes that have been taken place in the polity and economy of India since the Sarkaria Commission had last looked at the issue of Centre-State relations over two decades ago. The Commission examined and reviewed the working of the existing arrangements between the Union and States, various pronouncements of the Courts in regard to powers, functions and responsibilities in all spheres including



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legislative relations, administrative relations, role of governors, emergency provisions, financial relations, economic and social planning, Panchayati Raj institutions, sharing of resources including inter-state river water etc. The Commission made a number recommendations in its seven volume report presented to Government on 30 March 2010⁵⁷.

Devolution of Funds to States

Present Finance Minister, Mr. Arun Jaitley, while grating more fiscal autonomy to the states had laid emphasis on co-operative federalism during his Budget Speech for Financial Year 2015-16. The relevant part of his speech is extracted below:

20. ...In keeping with the true spirit of co-operative federalism, we have devolved a 42% share of the divisible pool of taxes to States. As members of this august House are aware, this is an unprecedented increase which would empower states with more resources. The devolution to the States would be of the order of Rs. 5.24 lakh crore in 2015-16 as against the devolution of Rs3.38 lakh crore as per revised estimates of 2014-15. Another Rs 3.04 lakh crore would be transferred by way of grants and plan transfers. Thus, total transfer to the States will be about 62% of the total tax receipts of the country⁵⁸.

Niti Aayog

In a further step towards fiscal co-operative federalism, the Planning Commission

was scrapped by the Government and a new body i.e. National Institution for Transforming India (“NITI Aayog”) was formed. As per the Government of India, Cooperative Federalism, is a primary goal, while enabling States to have active participation in the formulation of national policy, as well as achieving time-bound implementation of quantitative and qualitative targets through the combined authority of the Prime Minister and Chief Ministers⁵⁹. It is important to note that NITI's Governing council includes Chief Ministers of all States and Lieutenant Governors/Administrators of Union Territories. Taking the involvement of States in the country's policy decisions a step further, NITI Aayog constituted Sub-Groups of Chief Ministers to settle complex issues for e.g. Swachh Bharat, Skill Development and Centrally-Sponsored Schemes⁶⁰.



IX. GST, IS IT A DECISIVE MOVE TOWARDS CO-OPERATIVE FEDERALISM?

The Parliament has recently passed the Constitution (101st Amendment) Act, 2016 ('GST Act'). The Act is also ratified by more than half of states and president's assent has also been given. GST Act paves the way for a uniform tax regime in the country i.e. Goods and Service Tax (GST) and will replace most of the current Central and State indirect tax levies. While the Constitution of India stands amended with passage of GST Act, statute for imposition and collection of GST is awaited.

Recommendations of 13th Finance Commission

In this regard, it is important to first refer to the recommendations made by the 13th Finance Commission, which recommended the introduction of GST in India. The Commission recommended that both Center and State must enter into a grand bargain to implement the GST. GST seeks to create a unified mechanism for the collection of indirect taxes that benefits both tax-payers and government. GST will help to create a true national market for goods and services. However, before implementation of GST, both Center and States will have to iron out significant disagreements over the shape and implementation of the GST between the States and between Centre and States. Keeping the experience of the implementation of VAT in mind, the 13th Finance Commission that the six elements of the Grand Bargain⁶¹ comprise of:

- (i) the design of the GST;
- (ii) its operational modalities;
- (iii) binding agreement between Centre and states with contingencies for change in rates and procedures;
- (iv) disincentives for non-compliance;
- (v) the implementation schedule and
- (vi) the procedure for states to claim compensation.

Therefore, a lot of co-ordination and co-operation is required between the Centre and State in order to make this grand bargain successful.

Pooling of “Sovereignty”

GST is envisaged as a uniform indirect tax on goods and services in India, cutting through the current maze of State and Central Taxes including



Excise, Service Tax, VAT, Luxury Tax, Entertainment Tax, Entry Tax etc. It is important to note that presently, both Center as well as States have a clear demarcation as to the legislative field and levy taxes in watertight compartments. For example, states are empowered to tax sale of goods under Entry 54 of List-II, whereas the Union Government are empowered to levy Service Tax on provision of Services under List-I. However, with the advent of Goods and Service Tax, both Center and State will have a concurrent power to tax both goods as well as services.

Significantly, speaking during the debate on GST Constitutional Amendment Bill in Rajya Sabha, Arun Jaitley, said that the states and Centre are pooling in their "sovereignty" to make the "one nation, one tax" possible⁶². Both Central Government and State Government has agreed to give up their sovereignty on certain legislative entries and create a uniform tax for taxing both goods as well as services under a common uniform tax. The significant features of GST bill are discussed below:

Concurrent Powers of legislation

Article 246 of Constitution of India provides for as well as limits the jurisdiction of Parliament as well as States over Union List, State List and the concurrent list of Schedule VII to the Constitution. Further, as per Article 254 law enacted by Central government shall prevail over the state government where the laws are conflicting on subject matter of concurrent list.

As per the GST Act, after article 246 of the Constitution, the following article is inserted, which is as follows:—

"246A. Special provision with respect to goods and services tax.— (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.



Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council".

It is important to refer to the definitions of Goods and Service tax inserted by GST Bill as Article 366(12A):—

(12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption.

(26A) "Services" means anything other than goods

Thus, GST shall be levied on all goods and services, except alcoholic liquor currently. Further, Article 366(26A) of the GST Bill reflects wide coverage of services by defining services as anything other than goods. However, the most important point to note here is that concurrent jurisdiction to tax both "goods" and "services" is a significant departure from the existing scheme of legislation, which provides for separate sphere of legislation with clear and strict demarcation. For e.g. where the Service tax/Excise lies with Parliament (Central Legislature) and Sales Tax, Entertainment Tax and Luxury Tax on goods remain in State's domain. It is clear that

the said Article 246A(1) shall empower legislature of both the Center as well as state government to make laws in respect of GST. This concurrent power of taxation is unprecedented and marks a paradigm shift as far as Indian Constitution is concerned. After the enactment of GST Bill, both State and Centre Government will have equal power to levy taxes on goods as well as services. However, Article 246A(2) reestablishes the center's exclusive control on interstate supply of goods & services.

Creation of Goods and Service Tax Council (GST Council)

In order to give effect to concurrent powers, Article 279A is proposed to be inserted which provides for a setup of GST Council within 60 days of commencement of GST Act. The members of GST Council shall include:

1. Finance Minister of Union Govt. - Chairperson
2. Union Minister of state in charge of revenue — Members
3. State Finance Minister/Nominated State Ministers — Members

Under proposed Article 279A(4), the GST Council shall make recommendations to the Union and the States on the following issues—



- (a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;
- (b) the goods and services that may be subjected to, or exempted from the goods and services tax;
- (c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of Inter-State trade or commerce under article 269A and the principles that govern the place of supply;
- (d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;
- (e) the rates including floor rates with bands of goods and services tax;
- (f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;
- (g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
- (h) any other matter relating to the goods and services tax, as the

Decision by GST Council

As per proposed Article 279A(9), the decision shall be taken by 3/4th majority of the weighted votes of the members present and voting, in accordance with the following principles,

- (i) the vote of the Central Government shall have a weightage of one third of the total votes cast, and
- (ii) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

This arrangement though provides a greater weightage to the Central Government, however it is clear that no unilateral decision by either Central Government or States will be possible. As per the proposal, no decision is possible by GST Council unless both Centre and a majority of states are on board. In other words, both Centre and States have a "Veto" on each other. This arrangement is perfect example of "co-

operative federalism” between the Center and States, as for each and every decision a co-ordination between the Center and States is necessary. It is pertinent to mention that the aforesaid arrangement is different from earlier suggested model under 2011 Constitutional Amendment Bill, which provided that decision in GST Council shall be taken by majority.



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Adjudication of Disputes

Article 279A(11) also proposes that the GST Council shall establish a mechanism to adjudicate any dispute—

- (a) between the Government of India and one or more States; or
- (b) between the Government of India and any State or States on one side and one or more other States on the other side; or
- (c) between two or more States, arising out of the recommendations of the Council or implementation thereof”.

Apportionment of taxes on inter-state supply of Goods and Services

To avoid any disputes between different states as to applicability of GST on an inter-state transaction, it is proposed that Government of India shall have sole jurisdiction to collect tax on such transactions. In this regard, GST Bill proposes to introduce Article 269A, which provides that GST on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India.

Article 269A further provides that such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council. It is proposed that imports in India will also come within the purview of inter-state trade and consequently, Government of India will have exclusive jurisdiction to levy GST on imports. Articles 269A(1A)(1B) and (1C) is inserted to provide that the amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India. Further as per Article 269(2), Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Article 270 provides for apportionment of taxes and duties between Union and State. The Interstate GST has been kept out of this by inserting necessary exception. The reason for this exception is since the apportionment in interstate's case is not to be undertaken as per Article 270 laid mechanism but on recommendations of GST council as facilitated under Article 269A.

In other cases of GST levied by Government of India, a new clause 270(1A) is inserted and apportionment to be in accordance with normal provisions of Article 270 only.



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Parliament will have no power to levy surcharge on GST

Article 271 empowers the parliament to increase taxes and duties on articles. The

GST has been made an exception to power of parliament and as a consequence the parliament will not be empowered to impose surcharge on GST.

Amendments in Union, State List of 7th Schedule of the Constitution

List I – Union List

- Entry 84 (Substituted) - Excise Duty on manufacture of goods is removed except on petroleum, High speed diesel, petrol, natural gas, aviation turbine fuel and tobacco or tobacco products.
- Entry 92 (Removed) - Taxes on the sale or purchase of newspapers and on advertisements published therein
- Entry 92C (Removed) – Taxes on Services

List II – State List

- Entry 52 (Removed) - Taxes on the entry of goods into a local area of consumption, use and sale therein i.e. Entry Tax
- Entry 54 (Substituted) – Taxes on intra-state sale of goods has been removed except on petroleum, High speed diesel, petrol, natural gas, aviation turbine fuel and tobacco or tobacco products.
- Entry 55 (Removed) – Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio and televisions
- Entry 62 (Substituted)— Taxes on luxuries, including taxes on entertainment, amusements, betting and gambling i.e. Luxury tax, entertainment tax etc. has been removed, however panchayats, municipalities and regional councils will have power to levy such taxes.

Other Amendments

Article 248 of the GST Act which empowers the parliament to make laws on any matters not covered in state list and concurrent list is now made subject to Article 246A as GST will be in both centre's and state's domain despite the same not being specified in in State List or Concurrent List.



Article 249 empowers the Parliament to make laws even of state list where it is in national interest and the council of states have passed a resolution to this effect of 2/3rd members or more. The scope of this provision has been extended to GST as well to empower Parliament to make laws with respect to GST provided that the conditions of the said Article are satisfied.

Article 250(1) empowers the parliament to make laws even of state list if a proclamation of emergency is in operation. This provision is also made applicable to GST levied under Article 246A.

Article 268(1) provides for levy Excise Duty on medicinal and toilet preparations mentioned in the Union List but which is collected by state. Now, this Article is suitably amended to exclude duties of excise on medicinal and toilet preparations. Consequently, GST will be applicable on medicinal and toilet preparations.


Article 268A, which provides for apportioning of taxes on services between centre and state is removed, which may not be relevant owing to the concurrent taxing power on both goods and services and new scheme for apportionment of taxes.

Article 286, which imposes restrictions for imposition of taxes by states on sale or purchases of goods in case of interstate trade, imports or exports or trade outside the

state is amended to extend the same to GST.

X. CONCLUSION

Far from being a case of “cooperative federalism” or even “competitive federalism”—India seems to be a case of “conflict federalism”, where states and the center have different and competing visions of what federalism itself means. If one were to find a common thread between the union-state tussles over various issues including recent controversies in Arunachal Pradesh, Delhi, and Uttarakhand, and the GST Council's structure, it is that the union government believes in a “controlled federalism”, a system where the states are little more than mere appendages to the union's overarching goals⁶³. It may be important to note that during the Rajya Sabha debate on GST bill, members representing State of Tamil Nadu described the GST Bill as violative of basic structure of the Constitution. It will be interesting to see whether GST, which allows the Centre to determine and direct the tax policies of a State through a binding ‘recommendation’ of the Council will pass the ‘basic structure’ test. Success of GST may pave way for further

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co-operation between Center and States in other areas. Having said that, GST will have to first endure the test of time, before it is termed as a successful experiment in Indian Federalism.

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